

MCC INTERVIEW: Elise Bloom / Proskauer

Risk Assessment: A Path to Value

Study of approaches and attitudes toward employment matters suggests avenues of influence for inside counsel

In a new survey of in-house counsel, "Value Insights: Delivering Value in Labor and Employment Law," Proskauer, a labor and employment pacesetter, set out to better understand the impact of employment law matters on in-house counsel and to uncover ways in which those counsel can add even more value for their business partners. Elise Bloom, a top employment litigator, discusses below the often-surprising results of the Proskauer survey in remarks that have been edited for length and style.

MCC: *What motivated the firm to develop its survey of corporate counsel, "Value Insights: Delivering Value in Labor and Employment Law"?*

Bloom: In working with in-house counsel, we have observed that labor and employment matters generally consume a large amount of their time, attention and budgets. We wanted to understand better what they were focusing their efforts on and whether the focus was aligned in such a way so as to provide maximum value to their business partners. We also wanted to provide insight into how in-house lawyers can effectively partner with outside counsel on labor and employment law matters.

MCC: *At a time when corporate counsel report pulling more work inside and cutting back on spending on outside counsel, 23 percent of the respondents to your survey said that they expect to see increased spending on labor and employment matters. What's behind that unexpected finding?*

Bloom: Labor and employment is highly regulated in some areas. We've seen a lot of action from the Department of Labor of late.



The survey provides in-house counsel with tools to more effectively help their business partners achieve their objectives.

I think we're going to see an uptick in litigation, and that's one of the reasons that, even though in-house counsel generally are trying to pull more work in-house, there's going to be greater spending on labor and employment law matters.

MCC: *Perhaps the most surprising finding is that a very small percentage of companies report having a formal process for assessing the level of risk associated with disputes – just 19 percent of those surveyed (44 percent in larger companies). Given the uncertainty and perils of litigation, not to mention the widespread concern within companies with risk generally, what do you think is driving this attitude?*

Bloom: I don't necessarily think it's a formal attitude. I think that, in part, it reflects being reactive as opposed to proactive. One of the important things that came out of this survey is that a great way for in-house counsel moving forward to be more proactive and to become better business partners with their colleagues is to develop effective tools for risk assessment – tools that balance the business objectives, such as setting precedents, with potential consequences, such as bad publicity or consuming large amounts of high-level executive time. This presents a great opportunity for in-house counsel to sit down and talk to their business partners about the things that matter. It's an

opportunity to examine where the potential legal risks are and to work with outside counsel to develop a risk assessment tool. I don't think it was a conscious decision not to have one. It's a function of litigation generally – that companies tend to be reactive when it comes to disputes. I was pretty excited to have that finding come out of the survey because it provided meaningful insight into how in-house counsel can add value that's going to be meaningful to their business partners.

MCC: *Given the prevalence of employment issues and litigation, very few in-house departments dedicate internal resources to the area, with 53 percent reporting that they have no dedicated in-house employment lawyers and 80 percent reporting just one or two. That seems odd given the trend of pulling more work inside. What's behind that?*

Bloom: Part of it is historical. A lot of companies have had one or two people designated to labor and employment. The litigation risk in terms of potential exposure can be smaller in some kinds of labor and employment law cases. Obviously, in the type of work that I do, the class action work, the exposure in dollars can be a lot greater. There's sort of an imbalance because at times companies don't understand that labor and employment law questions – the internal, counseling-type questions – can actually consume a large portion of in-house counsel's time. If you look at the survey, you'll see that in-house counsel talk a lot about spending the preponderance of their time on counseling. And it's the proactive counseling that actually can prevent litigation. Just looking at the potential monetary risk of litigation, maybe companies are not valuing counseling as highly as they should.

Elise Bloom

A member of the firm's executive committee, co-head of the Class & Collective Actions Group and former co-chair of the Labor & Employment Law department at Proskauer.
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MCC: *Despite a great deal of talk about the importance of arbitration, including mandatory arbitration for all employees as a means of controlling litigation costs, far fewer companies report actually using arbitration. Those who do use it report great uncertainty about its effectiveness. Can you please comment on this. Is the debate about forced arbitration much ado about nothing?*

Bloom: It's really interesting because everyone talks about it. Will it cut down the number of claims? Will it increase the number of claims? Can it actually be preventative? What we've learned is that companies that have good arbitration policies would probably tell you that, on balance, it has cut down on the number of claims. Not because people are less likely to go to arbitration but because a lot of lawyers might be less likely to take on a case. It was interesting for us to learn that; although there's all this talk about it, very few companies actually implement it. We're asked all the time by companies whether they should have arbitration programs. We spend a lot of time talking about the pros and cons, and then very, very few companies actually implement them. Part of it, too, is just fear of the unknown. In arbitration, you do, in some ways, have to surrender, or potentially surrender, your appeal rights, which can be important to companies

MCC: *Many respondents expect the use of alternative fee arrangements as a driver of predictability in spending to rise, and none expect usage to shrink. Where do you think AFAs are used most frequently – class actions, single-plaintiff cases – and how do you expect this to evolve given the broad sentiment in favor of more usage uncovered in this survey?*

Bloom: Right now, I think that they are used most often in single-plaintiff cases, and certain counseling projects, such as a state

survey or an internal audit. They can also be used for segments of litigation, for example, the e-discovery piece of it. I think companies are gravitating to more global AFAs, meaning AFAs that are not tied to a particular case or a particular project. There will be set fees per month. You'll have to clearly define the scope, but the scope, depending on the fee, could include a specific number of litigations and a certain amount of counseling hours. Everybody – in-house counsel and outside counsel – will have to get comfortable with the concept that you cannot tie the work to billable hours. That means that in some months the firm is going to put in a lot more time than is reflected in the monthly fee, and in other months the firm is going to put in a lot less time than the hourly fee. It'll be based on a common understanding that at the end of the day, it's going to net out.

The value to the company is having access to lawyers who are going to know your business really well and who will know your business partners really well. Therefore, they will be able to provide more effective and efficient legal advice – legal advice that's more tailored to your business needs. As a result, I think AFAs will be much more comprehensive.

MCC: *You put together a panel of advisors to assist with the survey. What did this esteemed group see as the single most surprising finding? What most surprised you as a leader in one of the world's top labor and employment practices?*

Bloom: The single most surprising finding to the advisory committee, including Proskauer alumni who have been in-house for significant periods of time, and then to us as a firm is the fact that companies don't have a formal risk assessment process. I think that's one of the greatest learnings from the survey and, as I said, a really great way for in-house counsel to show their value to their business colleagues and really be proactive.

In order to develop an effective risk assessment tool, you have to understand what the business objectives of the company are and how the business leaders in different segments think about different issues. Having that kind of dialogue has to improve how business leaders look at their in-house counsel.

MCC: *We talk to a lot of law firms about data security, risk assessments and other similar areas. Is there a formula, or any best advice you can give, to in-house counsel? Certainly, from your desk, you're seeing a lot more litigation and settlements than any single in-house lawyer is seeing.*

Bloom: That's where I think you can really make effective use of your outside counsel. From the outside counsel perspective, we can certainly provide value in terms of what types of claims we're seeing and how we see them playing out. What are the factors that you really need to look at when considering whether this is a claim that has the potential to lead to large liability? Can it be contained?

The other part of the equation is to understand the business objectives of the company. Is publicity or avoidance of publicity important to them? Is not having executives tied up in depositions important? Outside counsel can really add value because we see a lot of different things. We see this broad landscape and can assess where the potential vulnerabilities are. For in-house counsel, the key is being able to sit down and understand what your business colleagues see as important priorities.

In-house lawyers don't get to do that a lot. That's because a lot of what they do is reactive. That's one of the other things we heard from the survey. Putting together a risk assessment profile is a great way for in-house counsel to show their business partners that their priorities are important. We want to understand what matters to you so that we can better deliver meaningful value.